IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 310 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

I B P CO. LTD. DIVISIONAL MANAGER

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 310 of 2004

MR MI HAVA for Petitioner No. 1

RULE SERVED for Respondent No. 1

MR KT DAVE, APP for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 30/09/2004

CAV JUDGEMENT

1. The petitioner is Indo Burmah Petroleum Company Ltd. which is a Public Limited Company incorporated

under the Companies Act, 1956 and is a government company having its Regd. Office at Kolkatta and affairs of the company have been managed by the Divisional Manager, having his office at Ahmedabad. The petitioner company has challenged the legality and validity of the order dated 2.6.2001 passed by the Collector, Mehsana as well as the impugned judgment and order dated 23.02.2004 passed by the ld. Addl. Sessions Judge, Mehsana in Cri. Appeal No.36/2001 preferred by the petitioner under Sec.6(C) of the Essential Commodities Act, 1955.

2. The petitioner company has alleged that the petitioner company is regulated by Oil Board of India and is controlled by the Ministry of Petroleum, Govt. of India and it is one of the subsidiary of Indian Oil Corporation Ltd. To appreciate the points raised by the petitioner company in the present Cri. Rev. Application, it is necessary to state the facts in brief. (i) That the petitioner company owns and runs large number of Petrol Pump -Retail Out-let (hereinafter referred to as ROL for short) selling the petrol, diesel, oil and other petroleum products and one such petrol pump ROL is located on a parcel of land being S.No.55, Mehsana Radhanpur Highway Cross-Roads. The petitioner company has installed tanks, dispensing pumps, other electrical apparatus and equipments etc. at the said ROL and is operating the ROL under the supervision, control and management of the petitioner company. The product sold at the ROL to company and is dispatched from Oil Deport on stock-transfer basis. MST Licence, Storage Licence, NOC, Explosive Licence, Sales-tax Registration etc. all stand in the name of the petitioner company. The cash-memoes are issued in the name of the petitioner company. For short, it is contended that the said ROL is company's owned and operated pump.

(ii) It is the say of the petitioner company that one contractor is appointed for supplying men-power for collecting cash, depositing in Bank and for performing other related services at ROL in question and one M/s Luna Engineering Works is working as a Labour Contractor under an agreement dated 25.07.2000 and the contract, at the relevant point of time, was for one year effective from 1.8.2000.

(iii) It is the say of the petitioner company that as per the prevailing practice in Oil Ministry, none of the oil companies running a company owned pump were obtaining Retail Selling Licence (hereinafter referred to as RSL for short), but because of the order issued by the respondent State of Gujarat under the Gujarat Essential

Articles (Licensing, Control & Stock Declaration) Order, 1981 (hereinafter referred to as Licensing Order), it was clarified that if the ROL - Petrol Pumps owned by the Oil Companies were run and operated by the Companies through its officers or its own staff, then under the aforesaid Licensing Order, no RSL is required to be obtained. However, if the ROL is run through Agents/ Contractors or through outside Agency, then for any irregularity or breach, Company and such Licensee shall be jointly responsible. So, vide letter dated 8.1.2001, the petitioner company informed the Labour Contractor to obtain RSL by making necessary applications before the Mamlatdar, Civil Supplies Department of District Collectorate, Mehsana.

(iv) According to the petitioner company, prior thereto, on account of some inter-se disputes between the partners as to who obtains lease right of the land (the lessor) upon which the petitioner company's ROL is located, on an application made by one of the partners, the Collector, Mehsana ordered closure of the Petrol Pump by withholding supply under the Petroleum Act & Rules even without issuing notice to show cause to the petitioner Company, probably in the capacity of a revenue authority. The decision of the Collector was challenged before the appellate authority in the State of Gujarat against cancellation of No Objection Certificate, but when the petitioner Company was informed by the Deputy Secretary dealing with the appeal saying that it has no jurisdiction, the petitioner company approached this Court by filing writ petition being Spl.Civil Application No.9261/2000 on 29.08.2000 and challenged the decision of the Collector alleging arbitrariness. This Court (Coram: MS Shah, J), vide order dated 31.8.2000, granted ad-interim relief and ultimately, vide order dated 19.09.2000, taking serious view of the matter, restored NOC.

(v) Mr. Hawa, ld. counsel appearing for the petitioner company has taken the Court through the relevant part of the order of this Court (Coram: MS Shah,J) dated 19.9.2000 in Spl.C.A. No.9261/2000. It would be appropriate to quote relevant part of the order:-

"4. In the facts and circumstances of the case, however, it would be just and proper to direct that the District Magistrate & Collector, Mehsana shall not pass any order against the petitioner-company without giving reasonable opportunity of being heard to the petitioner

Company and in case any adverse order is passed, no such order shall be implemented without giving petitioner-Company at least one month's time to enable the petitioner-company to pursue appropriate remedy in accordance with law.

5. The petition is accordingly disposed of subject to aforesaid directions. Rule is discharged. Respondent Nos. 1 & 2 shall pay costs of this petition to the petitioner."

(vi) One of the contentions of the petitioner is that though the Company had succeeded in above-said Spl.Civil Application substantially, on restoration of No Objection Certificate, requested the contractor concerned to obtain necessary licence, if required and this was done because the respondent Collector has tried to over-reach the process of the Court by requisitioning the order dated 31.8.2000 and thereafter the above-referred order dated 19.9.2000 was passed. The feeling expressed by the petitioner company is that the stand of the petitioner company was not liked by the Collector and, therefore, the Inspector of Civil Supplies Department -subordinate to the Collector, carried out inspection of the very petrol pump -ROL on 20.1.2001 and forthwith issued directions to seize petrol and diesel stock, and then on the basis of the inspection report submitted by inspecting subordinate, the Collector issued a notice to show-cause dated 3.2.2001 calling upon the petitioner company to explain as to why seized stock should not be confiscated.

(vi) The resultant effect of the seizure was that of closure of the very petrol pump. Many alleged irregularities were pointed out in the notice to show-cause, but the main charge in the notice was that the company was running petrol pump through the labour contractor who had not obtained RSL. The company replied the notice on 22.2.2001 and informed the respondent Collector that the petrol pump is being run and operated by the company and its own staff and the contractor was only a labour contractor and, therefore, no RSL would be required. However, the company had also instructed the labour contractor on 8.1.2001 to apply for RSL and he had already made such an application. The company, therefore, requested the Collector to release the seized stock at the earliest. However, the Collector, vide order dated 2.6.2001, directed that out of seized stock of 22282.9 ltrs.of M.S.(Petrol) of the value of Rs.6,88,297.15 ps. and 16239 ltrs. of Diesel of the value of Rs.3,10,010,15 ps., totalling to the goods of the value of Rs.9,98,307.29 ps., 20% stock thereof of the

value of Rs.1,99,660.00 be confiscated to the State and on selling the same, value thereof be deposited with the Government Treasury.

(viii) The order of seizure and confiscation ultimately was challenged by way of filing appeal under Sec.6(C) of the EC Act. Ld. Addl. Sessions Judge, Mehsana, after hearing the appeal, vide impugned judgment and order dated 23.02.2004, confirmed the finding of the Collector. However, ld. Addl. Sessions Judge reduced the value (percentage) of the confiscated stock from 20% to 10%. It is observed by ld. Addl. Sessions Judge that the order on merits is not bad, but the amount confiscated is exorbitant and, therefore, in the interest of justice, that part of the order has been suitably modified.

3. Mr. Hawa, ld. counsel appearing for the petitioner company has taken me through the relevant documents produced with the present Cri. Rev.Application that were available before the Collector as well as in the record of ld. Addl.Sessions Judge, Mehsana, and has submitted that material error has been committed by the ld. Addl. Sessions Judge in holding that the company has committed violation of Rule 3(1)(b) of the Licensing Order. Rule-3 says that on or after 20.4.1981, as per sub-rule (1), no person shall carry on business as a dealer as regards the articles mentioned in Rule-3. Clause (b) of Rule-3(1) includes petroleum products. Therefore, except under and in accordance with the terms and conditions of a licence granted under the Licensing Order, one can not carry on the business as a dealer in petroleum products. So, it is rightly argued by ld.counsel Mr. Hawa that the restrictions imposed by Rule 3(1)(b) of the Licensing Order apply to a dealer. "Dealer" is defined in Licensing Order under Clause (5) which reads as under:-

"(5) "dealer" means a person, a firm, an association of persons a company, a corporation or a cooperative society engaged in the business of purchase, sale or storage for sale of any essential article, whether or not in conjunction with any other business and includes his representative, agent or, as the case may be, commission agent, but does not include-

(a) an agriculturist who deals in his own agricultural produce but does not engage in the business of purchase, sale or storage for sale of any essential article not produced by him;

(b) an oil company dealing in

petroleum products. "

Later part of clause (5) which carves out exceptions is relevant. The plain reading of the rule clearly reveals that oil company dealing in the petroleum products is not included in the definition of a "dealer".

Definition of "licence" is given in clause (11) and definition of "licence-holder" is given in clause (12) of Rule-2 of the Licensing Order which are also found relevant because one can be said to be a licence-holder provided first he is a dealer or as the case may be producer holding a licence under the Licensing Order. Both the definitions are reproduced hereunder:-

"(11) "licence" means a licence issued under this Order.

(12) "licence-holder" means a dealer or, as the case may be producer holding a licence under this Order; "

It was not the case in the notice issued by the Collector to show cause that the company was under an obligation to procure licence to deal with the storage and sale of petroleum products even then the company may be a producer. Definition of "Oil Company" given in Cl.(14) defines "oil company" as under:-

"(14) "oil company" means any company dealing in any of the petroleum products and includes the Indian Oil Corporation Limited (IOC), Indo-Burma Petroleum Company Limited (IBP), Hindustan Petroleum Corporation Limited (HPC) and the Bharat Petroleum Corporation Limited (BPC);"

Thus, the petitioner company IBP is one of the oil companies included in the definition of the "oil company". So, the stand of the petitioner company is that it being a Oil Company not included in the definition of "dealer" (and company included in the definition of "oil company" as defined in Cl.(14) of the Licensing Order), is not under an obligation to obtain a formal RSL as per the Scheme of Rule-3 of Licensing Order.So, RSL is not required to be obtained by the petitioner for any ROL- petrol pump that it runs on its own and the respondent, therefore, can not hold the company, in any way, responsible, if it runs ROLs within the State of Gujarat.

4. It has been further submitted by ld. counsel Mr. Hawa for the petitioner company that in most of the States of the country, similar provisions are there and in none of the districts of the State, such stand was taken by any Collector or by Civil Supplies Department. However, for the reasons best known to the Collector, Mehsana i.e. respondent no.1, he initiated proceedings against the petitioner. The order of the State Government dated 19.10.2001 expressly clarifies the contingency and, therefore, there was no scope of confusion. Thus, the insistence of Collector that the petitioner company must obtain RSL was not only contrary to the statutory rules i.e. Licensing Order, but also contrary to the administrative instructions issued by the State Government. However, to avoid controversy with the Collector, the company had instructed the labour contractor to obtain RSL. This entire aspect, legally as well as factually, has not been correctly appreciated by the ld. Addl. Sessions Judge. So, there is ample force in the say of ld. counsel Mr. Hawa for the petitioner company that but for this error, incorrect finding has been recorded.

5. Ld. APP Mr. Dave has mainly placed reliance on the the policy of the Government and on Govt. Resolution dated 20.12.2002 whereby the Addl. Secretary, Food & Civil Supplies Department has further clarified that if oil company has engaged services of a labour contractor for running and operating petrol pump, then also RSL shall have to be obtained. Of course, the petitioner company has not challenged the propriety or validity of the administrative instructions issued by the Govt. Resolution, but has raised a dispute as to the validity of administrative instructions which impliedly alter materially the relevant definitions provided under Rule-2 of the Licensing Order. The short point that has been raised by ld. counsel Mr. Hawa for the petitioner is that without entering into the validity and propriety of the government instructions issued on 20.12.2002, at least, the ld. Addl. Sessions Judge ought to have held that these instructions have no retrospective effect. The language of the resolution also indicates that it has a prospective effect. Unless contrary is established, administrative directions issued or modification in the statutory rules if are made, normally have prospective effect and not retrospective. So, on the day on which notice to show cause was issued by the Collector, Mehsana or criminal appeal under Sec.6(C) of the EC Act was filed by the present petitioner company before the Court of Sessions, no such administrative instructions were there. The State Government, for the first time, clarified that

if any labour contractor is engaged to run the petrol pump by the Company, then the company shall have to obtain RSL.

6. To appreciate the say of ld. counsel Mr. Hawa for the petitioner company and especially the findings recorded by ld. Addl.Sessions Judge, it is necessary to reproduce relevant part of the Government Directions emerging from the above-said additional instructions dated 20.12.2002. It says (in Gujarati) " Aa Babate Vishesh Spastata Karavani ke, Jo Petrol Pump chalavava labour contractor rakhel hoy, to pan, company-e Parvano Levano Raheshe". In the present case, stand of the present company is that pump in question is a company pump and the contract between the company and M/s Luna Engineering Works, is nothing but a contract for maintenance and handling. The Collector, as well as ld. Addl. Sessions Judge ought to have considered the relevant part of the contract because copy of the contract was very much available on record. This agreement has been arrived at and signed at Mumbai on 25th July, 2000. The Court found the following part of the said agreement more relevant to appreciate the findings recorded by the Collector and confirmed by the ld. Addl. Sessions Judge:-

" AND WHEREAS the Company is the lessee of the plot of land more particularly described in the first schedule hereto and the structures there on (hereinafter collectively referred to as "the premises") and has installed at the said premises the apparatus and the equipment described in the second schedule hereto (hereinafter called "the outfit"). The Company desires to run the retail outlet at the said premises as "Company owned and Company operated" (hereinafter called "the COCO").

AND WHEREAS the Company intends to engage the Contractors for performing various contractual jobs for the Company at the said COCO to be operated by the Company itself. And whereas the Contractors approached the Company with a request to allow him to perform the various contractual jobs for the Company as mentioned herein on such terms and conditions as may be laid down by the Company.

AND WHEREAS the Company has agreed to allow the Contractors to perform the said contractual jobs as mentioned herein below on the following terms and conditions.

1. xxx xxx xxx
2. The Contractors shall have the right only to enter the premises for the purpose of performing the jobs stated in Clause-2 at the said premises and shall have no right, title or interest in the said premises or outfits and it is agreed by the Contractors and declared in particular that the Contractors shall not be deemed to be in exclusive possession of the said premises.
3. xxx xxx xxx "

7. One of the conditions of the contract reveals that the contractor is to be paid a lumpsum amount of Rs.27,500/ per month for sale of Volume (of both MS Petrol & HS Diesel) up to 200 KL per month and this figure of lumpsum payment can increase in accordance with the sale of higher volume of MS Petrol & HS Diesel. The status, therefore, of the contractor is of a licensee of the company itself and the same is subject to the supervision and control of the Company. So, it is not even possible to infer that the pump in question was given by the Company to the contractor so that contractor can run the petrol pump. The Company was responsible, if the contract is read in legal terms and interpreted strictly, in many areas, and unless on facts it is possible to conclude that M/s Luna Engineering Works was a runner of the petrol pump on behalf of the company in the capacity of a labour contractor, the company can not be casted responsibility to obtain licence for a contract or some error of obtaining such or similar licence of the contractor even if found committed, even then it can not be said to be a person responsible for violation of Rule-2(1)(g) of Licensing Order as alleged.

8. It would be legally wrong to say that merely because the petitioner company had instructed the contractor to obtain RSL, the Company agrees with the stand taken by the respondent because it is categorically averred that certain steps are taken to avoid conflict between the administration and smooth running of petrol pump owned, organized and managed by the company. Change in global scenario in contractual field and especially in labour contract and style of management of a business have introduced many new things and the same has brought dynamic change. This aspect has not been looked into while appreciating the document i.e. the contract between the petitioner company and it's handling contractor. Even otherwise, as discussed earlier, the

directions of 20.12.2002 have no retrospective effect and so the say of the petitioner company ought to have been accepted by the Court of Sessions.

9. The Court is not in agreement with the say of the State Government that the company has attempted to bypass the provisions of Licensing Order and there was no effective supervision or control over the operation of the petrol pump in question. Explanation given to the Collector ought to have been cross-checked by the administration wherein the petitioner company has said "we have posted our officers especially to supervise and control the operations at the company owned and company operated pump". The cash memos are also issued in the name of the company. MST License and other sales-tax licences are also in the name of the company so if any wrong is committed, then the company or its officers would be held responsible on all the aspects in all such aspects and subjects.

10. For short, the Court is of the view that both the authorities have committed gross error in interpreting the facts as well as rules and law brought to the notice of both the authorities and ignoring one material fact that the government directions issued in the year 2002 have no retrospective effect and these directions would apply in the cases in particular set of facts only. Hence, present Cri. Rev. Application shall have to be allowed.

11. In the result, present Cri. Rev. Application is hereby allowed. The impugned order 2.6.2001 passed by the Collector, Mehsana as well as the impugned judgment and order dated 23.02.2004 passed by the ld. Addl. Sessions Judge, Mehsana in Cri. Appeal No.36/2001 preferred by the petitioner under Sec.6(C) of the Essential Commodities Act, 1955, both are hereby quashed and set aside and the say of the petitioner company is accepted that no RSL was required to be obtained by the petitioner company or the contractor on the relevant date. In view of above, the goods confiscated require to be handed over to the petitioner company and the same are not required to be confiscated and/or the amount equal to the value of the goods confiscated shall not be required to be deposited in the Govt. Treasury, and if deposited, then the same shall be refunded to the petitioner. Rule is made absolute in above terms.

[C.K. BUCH, J]

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